

Unpaid Interns: Does The Law Actually Require That They Be Paid For Their Work?

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Do you have students and recent graduates eager to learn about your company and industry just to get a leg up for future employment prospects? Did you know that unless you are careful, you may have to pay them even if they are willing to work for free?

A happy coincidence occurs during the summer months. There is increased commercial demand for goods and services, business need for more workers, and expansion of workers in the labor force supplied by new graduates or students on summer vacation. In fact, many of these individuals are happy to offer their help without the

expectation of being paid in return.

However, your business must not turn a blind eye to the wage and hour laws. The same goes for government agencies and charitable organizations, who offer little more to the student than a great experience and perhaps academic credit to boot. "Free" labor may appear to be innocuous but it opens your company, agency, or organization up to serious risk of violating both federal and state wage and hour laws. Employers who ignore these rules are potentially liable for back pay and liquidated damages (which traditionally equal double the back pay award).

Paid Employee v. Unpaid Intern

So, when does work become employment? More importantly, when is it permissible to receive free work from an "intern"?

The Fair Labor Standards Act ("FLSA") itself does not have an exclusion from employee status for "interns." The U.S. Department of Labor ("USDOL") set out the following six criteria for making the determination whether an individual is an employee who must be paid or an intern who need not be paid:

- The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- The internship experience is for the benefit of the intern;
- The intern does not displace regular employees, but works under close supervision of existing staff;
- The employer derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
- The intern is not necessarily entitled to a job at the conclusion of the internship; and,
- The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

If the above-listed factors are met, an employment relationship does not exist under the FLSA, and, as a result, minimum wage and overtime provisions do not apply to the intern. It is the exclusion from the definition of employment that is the key.

A More Favorable "Intern" Test

Despite the DOL's 6-part test, the prospects for your business to get free help have taken a turn for the better. In the recent case of *Glatt v. Fox Searchlight Pictures, Inc.*, the United States Court of Appeals for the Second Circuit lowered the bar for classifying certain work as an unpaid internship. The Court held that if the individual is the "primary beneficiary of the relationship," then the employer is not required to pay minimum wage or overtime.

In *Glatt*, interns worked on the film *Black Swan*. They worked more than forty hours per week and performed a variety of tasks, including clerical duties; tracking purchase orders; transporting items to and from the set; maintaining employee files; moving furniture; arranging lodging; taking out the trash; taking lunch orders; answering phone calls; etc.

They later filed suit, claiming compensation for minimum wage and overtime as employees under the FLSA and state law. They were partially successful at the district court level, but the court's partial summary judgment holding that they were FLSA employees recently was reversed by the Second Circuit.

On appeal, the Second Circuit rejected both the DOL's six-part test and the district court's less stringent version of the six-factor test. In overturning the district court, the Second Circuit held that the proper question is whether the intern or the employer is the "primary beneficiary" of the relationship. The court focused on what the intern did and applied a facts and circumstances test based on a non-exhaustive set of considerations, which includes the extent to which:

- The intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee.
- The internship provides training similar to that given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- The internship is tied to the intern's formal education program by coursework or the receipt of academic credit.
- The internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The duration of the internship is limited to the period in which it provides the intern with beneficial learning.
- The intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- The intern and the employer understand that the intern is not entitled to a paid job at the conclusion of the internship.

According to the Second Circuit, "[t]hese considerations require weighing and balancing all of the circumstances. No one factor is dispositive and every factor need not point in the same direction for the Court to conclude that the intern is not an employee entitled to the minimum wage." The case ultimately was remanded back to the district court for reassessment of the evidence in light of the new test.

Although the Second Circuit is but one of thirteen Courts of Appeal in the federal system (and is not the appellate court for North Carolina), it includes what, perhaps, should be considered the capital of internships (*i.e.*, New York City). Therefore, in the absence of any opinion on the subject by the Supreme Court of the United States, the Court's opinion in *Glatt* is likely to be very influential in other courts.

Recommendations for Handling Your Unpaid Interns

Interns used as substitutes for regular workers should be paid at least the minimum wage, as well as overtime compensation for hours worked over forty in a work week. If you would have hired additional employees or required existing staff to work additional hours in the absence of interns, then the interns will be viewed as employees who are entitled to compensation under the FLSA. On the other hand, job shadowing opportunities that allow an intern to learn certain functions under the guidance of regular employees are more likely to be viewed as bona fide educational experiences.

Any internship should be of a fixed duration established prior to the outset. Unpaid internships generally should not be used as a trial period for individuals seeking employment at the conclusion of the internship because an intern who expects a job

upon completion is generally considered an employee under the FLSA.

You should document the internship relationship in a memorandum signed by the intern and a company representative. The memorandum should:

- Acknowledge the unpaid nature of the program;
- Describe the contemplated educational component;
- Stipulate the fixed duration of the internship;
- Explicitly state that the internship is not a trial period for prospective employment; and,
- Contain a disclaimer of any coverage under the Workers' Compensation Act or participation in employee welfare benefit plans by your intern.

Document any and all information that has to do with the intern's coursework, instructor, competencies to be developed by the intern, and the strategies employed to achieve them. Closely monitor your intern throughout the course of the relationship to ensure that the benefit of the program inures primarily to your intern, and not your bottom line.

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